No. 49871-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

PURCELL D. TOSTON, JR.,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Washington Statutes

Constitutional Provisions

Other Rules or Authorities

I. ISSUES

A. Did the State present insufficient evidence to sustain Smith's conviction for Assault in the Second Degree?

B. Did the trial court err when it failed to give the requested lesser included jury instruction for Assault in the Fourth Degree?

C. Is Toston's challenge to his community custody condition ripe for review?

D. Did the trial court fail to make an adequate individualized inquiry regarding Toston's ability to pay non-discretionary legal financial obligations prior to imposing such obligations?

II. STATEMENT OF THE CASE

Geovanny Blanco was a resident at American Behavioral Systems (ABHS) in Chehalis, Washington. RP 70. ABHS is an inpatient drug and alcohol treatment center. RP 108. Mr. Blanco was sent to ABHS as an alternative to going to prison due to a conviction for Theft of a Motor Vehicle in 2016. RP 70-71. Mr. Blanco is not from the Chehalis area, but from Yakima, and had arrived at ABHS on July 14, 2016. RP 72.

On September 3, 2016 Mr. Blanco and Toston were involved in an incident at ABHS. RP 73-74. Toston had stirred up something earlier that day. RP 74. Mr. Blanco discussed the matter with other residents at ABHS. RP 74. Mr. Blanco was able to clear up part of the misunderstanding with another resident. RP 74.

Mr. Blanco then walked down the hall to go back to his room. RP 74. Mr. Blanco stopped in the hallway outside of Toston's room. RP 74, 81-82. Mr. Blanco spoke to Toston, and acknowledged to Toston that Mr. Blanco may have come off a bit offensive earlier. RP 74. Mr. Blanco then proceeded to tell Toston that he was a drama queen and that Mr. Blanco wanted Toston to stay away from him. RP 74.

Mr. Blanco began to walk towards his room. RP 74. Toston came out of his room, cussing at Mr. Blanco. RP 74-75. A member of the care team, Richard Manjares, came out of the elevator and observed a large crowd of people that grew very quiet. RP 111. Mr. Manjares lingered due to suspicion that something was not right. RP 111. Mr. Blanco and Toston were getting in each other's faces as the incident escalated. RP 111. Mr. Manjares heard Mr. Blanco tell Toston, "that he did not want to talk to him further, that he felt that he [,Toston,] was all about drama and that he [,Mr. Blanco,] was going to walk away." RP 111.

Mr. Blanco turned to walk away and Toston punched Mr. Blanco in the mouth. RP 79, 111. There had been no provocation, Mr. Blanco had not threatened or assaulted Toston. RP 91, 113. Mr. Blanco walked back to the office, never turning around to reengage

with Toston, even though Toston followed Mr. Blanco down the hall wanting to fight. RP 117, 125.

Mr. Blanco suffered a broken tooth, bruised cheek bone, and some swelling to his nose. RP 80. Mr. Blanco was seen at Centralia Providence Hospital to ensure his nose was not broken. RP 100-04. Mr. Blanco experienced pain for a couple of weeks due to the broken tooth. RP 92-93.

On September 6, 2016 the State charged Toston by Information with one count of Assault in the Third Degree. CP 1-2. The charge was amended on October 13, 2016 to Assault in the Second Degree. CP 5-6. Toston elected to exercise his right to have his case tried to a jury. *See* RP 9-176. Toston requested a jury instruction for the lesser included offense of Assault in the Fourth Degree and the trial court denied the request. RP 143-45. Toston was convicted as charged. CP 49. Toston was sentenced to 60 months. CP 54. Toston timely appeals his conviction. CP 63.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S FINDING THAT TOSTON COMMITTED THE CRIME, ASSAULT IN THE SECOND DEGREE.

Contrary to Toston's assertion, the State did prove that he inflicted substantial bodily harm when he assaulted Mr. Blanco. Toston argues the State did not present sufficient evidence to sustain the jury's verdict of guilty for his conviction for Assault in the Second Degree because the State did not prove Mr. Blanco suffered a fracture within the meaning of the substantial bodily harm definition. Brief of Appellant 7-13. This Court should find the State presented sufficient evidence to sustain the jury's guilty verdict for Assault in the Second Degree and affirm the conviction.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State Is Required To Prove Each Element Beyond A Reasonable Doubt And The State Did Such, Therefore, Presenting Sufficient Evidence To Sustain The Jury's Verdict For Assault In The Second Degree.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re* Winship, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); State *v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v.*

Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder…is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

To convict Toston of Assault in the Second Degree, the State was required to prove, beyond a reasonable doubt, that Toston, on or about September 3, 2016, in the State of Washington, (1) did intentionally assault Geovanny Blanco, and (2) recklessly inflicted substantial bodily harm. RCW 9A.32.021(1)(a); CP 5.

The to-convict instruction stated:

> To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about September 3, 2016, the defendant assaulted Geovanny Blanco;
>
> (2) That the defendant thereby recklessly inflicted substantial bodily harm on Geovanny Blanco; and
>
> (3) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these

> elements, then it will be your duty to return a verdict of not guilty.

CP 37, *citing* WPIC 35.13

Therefore, the State had to prove that Toston inflicted substantial bodily harm on Mr. Blanco. Substantial bodily harm is defined as,

> Substantial bodily harm means bodily injury that involves temporary but substantial disfigurement, or that causes temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

CP 39, *citing* WPIC 2.03.01; RCW 9A.04.110(4)(b). In Toston's case the deputy prosecutor argued that the substantial bodily harm occurred by fracturing Mr. Blanco's tooth, or temporary disfigurement by breaking the tooth. RP 67, 163, 171-72.

Toston argues the State failed to prove the necessary element of substantial bodily harm. Brief of Appellant 7-13. Toston spends a considerable amount of time discussing what the meaning of "fracture" is within the definition of substantial bodily harm and how the trial court applied the wrong definition thereby the State did not prove a fracture. Brief of Appellant 8-12. Toston's statutory construction argument is flawed. Toston also argues the State did not prove the alternative means of temporary, but substantial disfigurement. Brief of Appellant 12-13. Toston never applies, nor

even acknowledges, the correct standard of review in his analysis of whether the State presented sufficient evidence to sustain his conviction. When viewing all of the evidence presented in the light most favorable to the State, with all inferences drawn in favor of the State, the State proved that Toston inflicted substantial bodily harm. *Goodman,* 150 Wn.2d at 781

a. A broken tooth is a fracture, and therefore substantial bodily harm.

The trial court included an additional definitional instruction for fracture which stated, "Fracture means: the act or process of breaking or the state of being broken; the breaking of hard tissue; the rupture (as by tearing) of soft tissue." CP 40. Toston argues fracture, as found in RCW 9A.04.110(4)(b) can only be read as a break of a bone, under what he states is the correct medical definition of the term. First, Toston's analysis of definition of fracture is incorrect. Toston incorrectly interprets the definition of fracture under the substantial bodily harm statute. Second, Toston's medical definition argument, if accepted by this court, is still incorrect, because a broken tooth is considered a fracture under the medical definition.

The courts will not employ judicial interpretation if a statute is unambiguous. *State v. Steen*, 155 Wn. App. 243, 248, 228 P.3d 1285 (2010). "A statute is ambiguous when the language is susceptible to

more than one interpretation. *Steen,* 155 Wn. App. at 248. When the reviewing court is interpreting a statute its "goal is to ascertain and give effect to the intent and purpose of the legislature in creating the statute." *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660 (2005) (citation and internal quotations omitted). The court looks to the plain language in the statute, the context of the statue, and the entire statutory scheme to determine the legislative intent. *Steen*, 155 Wn. App. at 248; S*tratton*, 130 Wn. App. at 764 (citations omitted). If the statute fails to provide a definition for a term then the courts look to the standard dictionary definition of the word. *Stratton*, 130 Wn. App. at 764. If the court finds a statute is ambiguous, "the rule of lenity requires that we interpret it in favor of the defendant absent legislative intent to the contrary." *Id.* at 765.

The plain reading of RCW 9A.04.110(4)(b) does not require a medical definition of fracture. The plain reading of the statute is "or which causes a fracture of any bodily part." RCW 9A.04.110(4)(b). The failure to define fracture means the court turns to the dictionary definition for the term. A fracture is defined as:

> 1 a: the act or process of breaking or the state of being broken : rupture by a break through the entire thickness of a material : BREACH; *specif* :the breaking of hard tissue (as a bone, tooth, or cartilage) b: the rupture (as by tearing) of soft tissue <kidney~>.

Webster's Third New International Dictionary, 901.

While inherent in the dictionary definition of fracture is a broken tooth, bodily part is also not defined. Toston argues that "organ" cannot be considered within the definition of bodily part because it was obviously specifically excluded as it is specifically enumerated in the prior clause. Again, the plain reading of the statute, applying the dictionary definitions to the term bodily part, includes organs. Bodily is defined as, "of or relating to the body." *Id.* at 245. Part is defined as "a portion of plant or animal body: as (1): essential element : ORGAN, MEMBER." *Id.* at 1645.

Therefore, under the plain language of the statute defining substantial bodily harm, a fracture can mean "the act or process of breaking or the state of being broken: the breaking of hard tissue; the rupture (as by tearing) of soft tissue." CP 40; *See* RCW 9A.04.110(4)(b). There is nothing contained within the statutory definition of substantial bodily harm that requires a fracture to be narrowly construed as only the fracture of a bone. RCW 9A.04.110(4)(b). If the legislature wanted such an interpretation, it could have stated a fracture of a bone, not a fracture of a bodily part. The trial court's interpretation of fracture is within the plain meaning of the statute.

b. Regardless of the trial court's statutory interpretation of fracture, there was sufficient evidence presented that Mr. Blanco's broken tooth constituted substantial bodily harm.

The trial court's statutory interpretation of fracture, and whether it includes a rupture or tearing of soft tissue (such as an organ) is irrelevant to whether the State presented sufficient evidence to sustain the conviction for Assault in the Second Degree. The State presented testimony that a broken tooth is a fracture. Further, a broken tooth, in this case, is temporary, but substantial disfigurement.

i. A broken tooth is a fracture.

The State presented evidence that Geovanny Blanco suffered a broken tooth due to being punched by Toston, and that a broken tooth is a fracture. Mr. Blanco's uncontroverted account of the incident was that Toston struck Mr. Blanco in the face causing Mr. Blanco's tooth to become broken. RP 80; Ex. 1.[1]

Dr. Kim Thuy Le, an emergency room doctor at Centralia Providence Hospital also testified regarding what constitutes a fracture. RP 99, 103, 105. The deputy prosecutor and Dr. Le had the following exchange,

[1] The State will be filing a supplemental designation of Clerk's Papers to designated Exhibit 1.

> Q. Yeah. So, now, you say a chipped tooth. Is that any different than a fractured tooth?
>
> A. No, just another word. Just like kind of a broken bone versus a fracture. It's a broken piece of tooth.

RP 103. Later, during cross-examination, Toston's trial counsel and Dr. Le had the following exchange,

> Q. No fractures of anything?
>
> A. Well, outside the chipped bone, the chipped tooth.

RP 105.

The direct, undisputed evidence presented by the State was that Mr. Blanco had his tooth fractured. Toston, in raising a sufficiency of evidence challenge must admit the truth of State's evidence. *Goodman,* 150 Wn.2d at 781. The State is entitled to all reasonable inferences drawn in favor of the State from that evidence. *Id.* The credibility of the witnesses and the evidence is not subject to review. *Myers*. 133 Wn.2d at 38. Further, it has been previously held that a broken tooth is substantial bodily harm. *State v. R.H.S.*, 94 Wn. App. 844, 847, 974 P.2d 1253 (1999).

A chipped, broken, fractured tooth, however one wishes to term it, fit within the definition of substantial bodily harm. Therefore, the State presented sufficient evidence to prove Toston inflicted substantial bodily harm, a fracture of a bodily part, upon Mr. Blanco.

ii. A broken tooth constitutes a bodily injury which involves temporary but substantial disfigurement.

The State also proved, contrary to Toston's assertion, that Mr. Blanco suffered from temporary, but substantial disfigurement. Toston argues Mr. Blanco's "slightly chipped tooth" does not equate to temporary, but substantial disfigurement and therefore does not "rise to the level of 'substantial bodily injury'" Brief of Appellant 13.

Toston downplays Mr. Blanco's injury to his tooth. Mr. Blanco suffered from a broken front tooth. Ex. 1. This tooth remained unrepaired nearly two months after the incident. RP 87. The State acknowledges "substantial" requires, in the context of substantial disfigurement, "considerable in amount, value, or worth." *State v. McKague*, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011). The courts in Washington have found bruising, such as teeth marks that last for a couple weeks, and a bruise from being hit by a shoe, as temporary, but substantial disfigurement. *McKague,* 172 Wn.2d at 806, *citing, State v. Hoviq,* Wn. App. 1, 5, 13, 202 P.3d 318, *review denied,* 166 Wn.2d 1020 (2009); *State v. Ashcraft,* 71 Wn. App. 444, 455, 859 P.2d 60 (1993).

Toston, while citing to *McKague,* once again in analysis ignores the portion of the case law that requires him to evaluate the

evidence in the light most favorable to the State. *McKague*, 172 Wn.2d at 805. If violet and red teeth marks that lasted a couple weeks constitute temporary, but substantial disfigurement, so does a broken front tooth in the light most favorable to the State.

The crime of Assault in the Second Degree was proven beyond a reasonable doubt. Toston inflicted substantial bodily harm upon Mr. Blanco, whether it be by fracturing his tooth, or by causing temporary, but substantial disfigurement from the broken front tooth. Therefore, this Court should affirm Toston's conviction.

B. JURY INSTRUCTION SEVEN WAS NOT AN IMPERMISSIBLE COMMENT ON THE EVIDENCE.

Toston claims Jury Instruction 7, the instruction defining "fracture" misstated the law, and was therefore an impermissible comment on the evidence. Brief of Appellant 14-17. Using a dictionary definition of a term found within another definitional jury instruction is not a comment on the evidence. This Court should hold the trial court's use of Instruction 7 was permissible, not a misstatement of the law, therefore and not a comment of the evidence.

1. Standard Of Review.

Constitutional issues are reviewed de novo. *State v. Castro*, 141 Wn. App. 485, 490, 170 P.3d 78 (2007). Challenged jury

instructions are reviewed de novo and evaluated in the context of the instructions as a whole. *State v. McCreven*, 170 Wn. App. 444, 461-62, 284 P.3d 793 (2012).

2. Instruction Seven Was Not An Improper Comment On The Evidence.

The Washington State Constitution prohibits judges from charging juries with respect to matters of fact. Const. art. 4, § 16. "The object of this constitutional provision is to prevent the jury from being influenced by knowledge conveyed to it by the court as the court's opinion of the evidence submitted." *Heitfeld v. Benevolent & Protective Order of Keglers*, 36 Wn.2d 685, 699, 220 P.2d 665 (1950). Further, "a court cannot instruct the jury that matters of fact have been established as a matter of law." *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). An instruction which assumes a fact for the jury's determination constitutes a prohibited comment upon the evidence. *Martin v. Kidiviler*, 71 Wn.2d 47, 51, 426 P.2d 489 (1967).

An appellate court will consider an error claimed for the first time on appeal regarding a jury instruction if the claimed erroneous "instruction invades a fundamental right of the accused." *Becker*, 132 Wn.2d at 64. A judicial comment on the evidence is presumed prejudicial. *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076

(2006). It is the State's burden to show, absent the record affirmatively showing no prejudice could have resulted, that the defendant was not prejudiced. *Levy*, 156 Wn.2d at 723.

A jury instruction is not an impermissible comment on the evidence by the trial judge when it does nothing more than accurately state the law pertaining to an issue. *State v. Brush,* 183 Wn.2d 550, 557, 353 P.3d 213 (2015), *citing State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001). Adding the phrase "including a finger" to the definition of object in WPIC 45.01 did not violate Const. art. 4, § 6, as the instruction informed the jury of "the appropriate rule of law to the fact of this case" without indication how the court felt about the victim's testimony. *State v. Tili*, 139 Wn.1d 107, 127, 985 P.2d 365 (1999). A jury instruction that defined the word "threat" in accordance with former RCW 9A.04.110(25) did not violate Const. art. 4, § 16 as the instruction was an accurate statement of the law and did not convey an attitude towards the merits of the case. *State v. Ciskie*, 110 Wn.2d 263, 282-83, 751 P.2d 1165 (1988).

The standard WPIC for defining substantial bodily harm states,

> Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or

> impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

WPIC 2.03.01; CP 39. The courts have held that it can be proper to define a word used within an instruction by using a dictionary or common definition of the term. *State v. Atkison,* 113 Wn. App. 661, 667-68, 54 P.3d 702 (2002). In *Atkison* the court held it was allowable to use a dictionary definition to define "disfigurement" as a separate jury instruction to supplement and clarify the instruction for substantial bodily harm. *Id.* at 666-68.

Similarly, in this case, the trial court used a dictionary definition of fracture "that was accurate and merely supplemented and clarified the statute language." *Id.* at 668. Instruction 7 stated, "Fracture means: the act or process of breaking or the state of being broken; the breaking of hard tissue; the rupture (as by tearing) of soft tissue." CP 40. This was an accurate statement of law. It is an accurate definition of fracture, and using it to supplement Instruction 6, the substantial bodily harm definition, was completely permissible. *See* CP 39-40. This Court should find Instruction 7 was not a comment on the evidence and affirm.

3. The Record In Toston's Case Rebuts The Presumed Prejudice If This Court Finds Instruction Seven An Improper Comment On The Evidence.

Arguendo, if this Court were to find Instruction 7 an impermissible comment on the evidence, the State has rebutted the presumption of prejudice in Toston's case. "Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record shows affirmatively that no prejudice could have resulted." *Brush*, 183 Wn.2d at 559.

In this matter, there was direct evidence in the form of testimony from the victim, visual evidence, and testimony from an expert, that Mr. Blanco suffered from a fractured tooth. Mr. Blanco described to the jury how Toston punched him in the face and caused his tooth to become broken. RP 80, 82, 92-93. There was a photograph admitted as evidence that showed Mr. Blanco the night of the incident with a broken front tooth. Ex. 1. Finally, there was Dr. Le's testimony regarding what constitutes a fracture. RP 103, 105. Dr. Le explained that a chipped or broken tooth is a fractured tooth, just like a broken bone is a fractured bone. RP 103. Dr. Le explained they are just different words for the same thing. *Id.* And when asked

if Mr. Blanco did not suffer any fractures, the answer Dr. Le gave was, “Well, outside of the chipped bone, the chipped tooth.” RP 105.

If the trial court erred by impermissibly commenting on the evidence by giving Instruction 7, which the State is not conceding, on this record, no prejudice resulted. The jury was instructed that substantial bodily harm included a fracture of any bodily part. CP 39, citing WPIC 2.03.01; RCW 9A.04.110(4)(b). The testimony was clear that Mr. Blanco suffered from a fracture of a bodily part, his tooth. This Court should affirm the conviction.

C. TOSTON WAS NOT ENTITLED TO A JURY INSTRUCTION FOR THE LESSER INCLUDED OFFENSE OF ASSAULT IN THE FOURTH DEGREE.

Toston asserts the trial court erred when it refused to give his proposed jury instruction for the inferior degree offense of Assault in the Fourth Degree. Brief of Appellant 32-36. Toston argues the trial court erred when it refused to give the lesser Assault instruction when the evidence presented showed minor injuries sustained by Mr. Blanco, which the jury could rationally find did not support substantial bodily harm. *Id.* at 17-19. The State respectfully disagrees with Toston’s interpretation of the evidence. The trial court did not err because the evidence does not support the inference that,

as alleged, Toston only committed Assault in the Fourth Degree, to the exclusion of the charged crime of Assault in the Second Degree.

1. Standard Of Review.

This Court reviews refusals to give lesser or inferior offense instructions based upon the factual inquiry prong under an abuse of discretion standard. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson,* 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). This Court will find a trial court abused its discretion "only when no reasonable judge would have reached the same conclusion." *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002) (internal quotations and citation omitted).

2. Toston Was Not Entitled To Have The Trial Court Instruct On His Proposed Lesser Included Jury Instruction For Assault in the Fourth Degree.

Toston requested the trial court give a lesser included instruction of Assault in the Fourth Degree. CP 16, citing WPIC 35.25; CP 17, citing WPIC 35.26; RP 143-45. Toston's counsel argued merely because Assault in the Fourth Degree is a lesser included offense of Assault in the Second Degree he should get the

jury instruction for the inferior offense. RP 143. The trial court questioned Toston's counsel as to where was the evidence that the injury inflicted was not a fracture or the injury was not to a bodily part? RP 144-45. Toston's counsel conceded there was none. RP 145. The trial court denied the requested instruction for Assault in the Fourth Degree. RP 145.

Either party in a criminal action, the defense or the prosecution, has the right to request the jury be instructed on a lesser included offense or an inferior degree offense. RCW 10.61.003; RCW 10.61.006; *State v. Gamble*, 154 Wn.2d 457, 462, 114 P.3d 646 (2005). This right is established by statute and case law but it is not absolute. *Gamble,* 154 Wn.2d at 462-63. The party seeking the inclusion of an instruction on a lesser included or inferior degree offense must satisfy a factual and legal inquiry by the trial court regarding whether the inclusion of such an instruction is proper. *Id.* at 463.

The analysis regarding whether a trial court properly denied a party's request to include a jury instruction for a lesser included offense or an inferior degree offense is broken into two inquiries, one legal and one factual. *State v. Fernandez-Medina*, 141 Wn.2d 448,

454, 6 P.3d 1150 (2000). The analysis whether an offense is an inferior charged offense as applied to the law is:

> (1) The statutes for both the charged offense and proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense…

Fernandez-Medina, 141 Wn.2d at 454 (citations and internal quotations omitted). When dealing with a crime such as Assault in the Second Degree, it is clear Assault in the Fourth Degree meets the legal prong of the analysis for an inferior charged offense, therefore the only necessary analysis is factual. RCW 9A.36.021; RCW 9A.36.041; *Fernandez-Medina*, 141 Wn.2d at 454-55.

The factual prong of the analysis for an inferior degree offense requires, "there is evidence that the defendant committed **only** the inferior offense." *Id.* at 454 (emphasis added). This necessitates the inference must be that the inferior or lesser offense was the only crime committed to the exclusion of the crime charged by the State. *Fernandez-Medina*, 141 Wn.2d at 455. This standard is more particularized than the factual showing required for other jury instructions. *Id.*

The reviewing court evaluates the sufficiency of the evidence in support of the lessor included or inferior degree offense in the light

most favorable to the party that requested the jury instruction. *Id.* at 455-56. The evidence is not sufficient if it simply shows the jury may disbelieve the State's evidence that points towards guilty. *Id.* at 456. "The evidence must firmly establish the defendant's theory of the case." *Id.* A defendant may present inconsistent defenses, and doing such is not a bar to requesting a lesser included or inferior included offense instruction. *Id.* at 459-460. If the trial court errs by failing to give a properly requested lesser or inferior included offense instruction, such an error is never harmless. *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984).

The State alleged Toston committed Assault in the Second Degree under the substantial bodily harm prong of the statute. RCW 9A.36.021(1)(f); CP 5. The trial court instructed the jury on Assault in the Second Degree, substantial bodily harm, and a separate definition for fracture. CP 36-37, 39-40. The State was required to prove, that Toston assaulted Geovanny Blanco, thereby recklessly inflicting substantial bodily harm. CP 37, *citing* WPIC 35.13. To prove substantial bodily harm, the State had to show Toston fractured a bodily part or inflicted temporary but substantial disfigurement upon Mr. Blanco. CP 39, *citing* WPIC 2.03.01. As argued above, the evidence showed that Toston struck Mr. Blanco, breaking one of his

front teeth, which remained still unrepaired nearly two months later. RP 80, 82, 92-93. A broken tooth and a fractured tooth are the same thing according to the medical expert presented by the State. RP 103, 105.

For Toston to be entitled to a lesser included instruction for Assault in the Fourth Degree there must be an inference from the evidence that only the Assault in the Fourth Degree was committed. *Fernandez-Medina*, 141 Wn.2d at 454. Toston must be able to show the evidence inferred, in the light most favorable to him, that Toston, while assaulting Mr. Blanco, did not inflict substantial bodily harm. In other words, Toston only intentionally touched Mr. Blanco in a harmful or offensive way, to the exclusion of infliction of substantial bodily harm as alleged by the State. *See* RCW 9A.36.021(1)(f); RCW 9A.36.041; *Fernandez-Medina*, 141 Wn.2d at 454-55.

The trial court did not abuse its discretion when it declined to give Toston's proposed lesser included instruction for Assault in the Fourth Degree. The trial court evaluated the evidence, and invited Toston's counsel to explain where the evidence was that supported the inference that only Assault in the Fourth Degree was committed. RP 144-45. Toston's counsel had to acknowledge he could not meet the test that only the inferior offense had been committed. RP 145.

There was no error committed by the trial court when it refused to give the proposed lesser included jury instruction and this Court should affirm Toston's conviction.

D. TOSTON'S CHALLENGE TO HIS COMMUNITY CUSTODY CONDITION "AS ORDERED BY CCO" IS NOT RIPE FOR REVIEW.

Toston argues his community custody conditions that permits his Community Corrections Officer (CCO) to impose any condition of community custody he or she deem fit should be stricken because it is unconstitutionally vague. Toston is currently ordered to serve a 60-month sentence, consecutive to the sentence he was currently serving at the time of this incident. The challenge to this community custody condition is not ripe.

A pre-enforcement challenge of a community custody condition is ripe "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *State v. Cates*, 183 Wn.2d 531, 534, 354 P.3d 832 (2015) (internal quotations and citations omitted). Community custody conditions are final actions. *Cates,* 183 Wn.2d at 534. The Court is to consider the hardship that would incur upon the appellant if the Court were to refuse to consider the challenge on direct appeal. *Id.*

In *Cates* the trial court ordered,

> "You must consent to [Department of Corrections] home visits to monitor your compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of the residence in which you live or have exclusive/joint control/access, to also include computers which you have access to.

Id. at 533. The Supreme Court noted that while Cates challenge was a legal challenge, "the risk of hardship here is insufficient to justify review … before it is factually developed…Compliance here does not require Cates to do, or refrain from doing, anything upon his release until the State requests and conducts a home visit. Cates will not suffer significant risk of hardship if we decline to review the merits at this time." *Id.* at 535-36.

In Toston's judgment and sentence, under section 4.2 Community Custody portion, there is a provision titled "Other conditions:" that simply states, "AS ORDERED BY CCO." CP 56. Similar as to *Cates*, while this is a final action and a legal challenge, Toston will not be required to do anything by his CCO until released from prison. Further whether or not Toston is required to do anything beyond what is lawfully permitted and required under RCW 9.94A.704 is yet to be seen. This issue is not ripe and the Court should decline to review it on its merits at this time.

E. THE STATE CONCEDES THE TRIAL COURT'S INQUIRY OF TOSTON'S ABILITY TO PAY HIS DISCRETIONARY LEGAL FINANICAL OBLIGATIONS WAS INSUFFICIENT.

Toston argues the trial court failed to fully engage in an individualized inquiry regarding Toston's ability to make payments on his legal financial obligations before imposing costs and fees. Brief of Appellant 22-25. The trial court's consideration was not satisfactory, it did not ask Toston's job history, assets, or debts. See RP 183-84. The correct remedy is to remand this case back to the trial court for the judge to conduct the required inquiry.

1. Standard Of Review.

The determination to impose legal financial obligations by a trial court is reviewed by this Court under an abuse of discretion standard. *State v. Clark,* 191 Wn. App. 369, 372, 362 P.3d 309 (2015) (internal citation omitted). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *C.J.*, 148 Wn.2d at 686, 63 P.3d 765 (2003), *citing State v. Stenson,* 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

2. The Trial Court's Inquiry Was Not Sufficient For An Individualized Determination That Toston Had The Ability To Pay The Discretionary Legal Financial Obligations.

Toston was ordered to pay $500 victim penalty assessment; $200 filing fee; $46 sheriff service fee; $100 DNA fee; $1,200 attorney fee recoupment. CP 94-95. The DNA fee, crime victim assessment, and filing fee are all mandatory fees. *State v. Mathers,* 193 Wn. App. 913, 376 P.3d 1163 (2016); *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016). The attorney fee recoupment and sheriff service fee are discretionary.

In *State v. Blazina* the Washington State Supreme Court determined the Legislature intended that prior to the trial court imposing discretionary legal financial obligations, there must be an individualized determination of a defendant's ability to pay. *State v. Blazina,* 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Supreme Court based its reasoning on its reading of RCW 10.01.160(3), which states,

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Blazina, 182 Wn.2d at 837-38. Therefore, to comply with *Blazina*, a trial court must engage in an inquiry with a defendant regarding his or her individual financial circumstances. *Id*. The trial court must make an individualized determination about not only the present but future ability of that defendant to pay the requested discretionary legal financial obligations before the trial court imposes them. *Id*.

Here the trial court simply asked if Toston would have the ability to pay, if there were any mental, emotional, physical, or financial or any other reason he could not pay. RP 183-84. There was no inquiry into Toston's work history or ability to secure employment after release. *Id.* The trial court did not meet its obligation prior to imposing the sheriff service fees and attorney's fees. This Court should remand so the proper inquiry may be made.

IV. CONCLUSION

The State presented sufficient evidence to sustain Toston's conviction for Assault in the Second Degree. The trial court did not abuse its discretion when it denied Toston's request for a lesser included instruction of Assault in the Fourth Degree. Toston cannot raise the issue regarding his community custody condition as it is not yet ripe. The State concedes that the trial court failed to make the required individualized inquiry into Toston's ability to pay his legal

financial obligations prior to imposing discretionary legal financial obligations. This Court should affirm Toston's conviction and remand the case back to the trial court for the proper inquiry into Toston's ability to pay the discretionary legal financial obligations ordered.

RESPECTFULLY submitted this 19th day of October, 2017.

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